assignment or other indicia of transfer whatsoever. The nephew executed in his own handwriting an instrument purporting to be an assignment of the documents and by delivery of the several instruments to the plaintiff obtained from him a loan. The Court of Appeals refused unanimously to hold that the uncle was estopped to assert his ownership. The decision was based primarily upon the ground that the mortgagee owed to the plaintiff no duty to exclude all possibility of crime by the custodian he had selected. It seems unfortunate, however, that the court confined itself merely to the question of the duty owed. Had the judges considered as well the second and third prerequisites of Justice Blackburn's rule the self-contradictions in these requirements would undoubtedly have been brought to their attention and an opportunity would have been offered to render the rule really useful by eliminating the second prerequisite altogether and by modifying the third so as to demand only a change of position merely "reasonably consequent upon the carelessness".[13]

Accepting for the moment the modifications suggested just above and assuming that the requisite duty existed in the principal case, the question remains whether the facts in that case show that the change of position was sufficiently connected with the carelessness of the estoppel-denier to warrant a decision in favor of the plaintiff. The unanimity of the court augurs that even in such altered circumstances the defendant would not have been estopped. Nevertheless, by selecting for custodian a person bearing his own name and by depositing with this person instruments bearing on their faces indications that they belonged to the depositary in his own right, the defendant seems to have contributed largely to the deceit practiced upon the plaintiff and it seems only just that the disastrous consequences should be visited upon him who rendered the victimization possible, even if his carelessness happened to be slight, rather than upon a person utterly innocent of any carelessness at all.[14]

EVIDENCE OF THREATS BY DECEASED AGAINST DEFENDANT IN SUPPORT OF THE PLEA OF SELF-DEFENCE.—In support of a plea of self-defence in a prosecution for homicide, the defendant often wishes to introduce evidence of threats against him made by the deceased prior to the fatal conflict, in order to show the *animus* of the deceased or the defendant's extremity and fear. Such evidence is admissible only when the killing has been admitted, and for the purpose of establishing justification therefor.[1] If the threats had not been communicated to the accused before the killing, they may be used to show a design of the deceased to take his life or to do him grievous bodily injury. Proof of such a design gives rise to an inference that the deceased attempted to carry it into execution

[13]Ewart, Estoppel by Misrepresentation, 121-122.

[14]Such indeed appears to be the tendency of two earlier New York cases. Van Duzer *v.* Howe, *supra*, and McNeil *v.* Tenth Nat. Bank (1871) 46 N. Y. 325, 333.

[1]Siebert *v.* People (1892) 143 Ill. 571, 590; see 1 Wigmore, Evidence, § 111 (2). It is to be noted that neither the character of the deceased nor his threats against the defendant can, of themselves, in any manner serve to justify the killing. Their function is to show that the deceased was the probable aggressor, and hence that the defendant's self-defence was justifiable. People *v.* Arnold (1860) 15 Cal. *476; *cf.* Chase *v.* State (1872) 46 Miss. 683, 703; but see People *v.* Taylor (1904) 177 N. Y. 237.

and was, therefore, probably the aggressor in the subsequent encounter.[2] If, on the other hand, the threats had been communicated to the defendant, they may also be used for the purpose of showing that his apprehension of danger was reasonable and that he was in such apparent extremity as to warrant the measures of self-defence that he used.[3] Although the principles of the two classes of threats must be carefully distinguished,[4] a point that seems commonly to have been overlooked is that communicated threats may well indicate the probability of the deceased's acts by showing his attitude of mind as completely as uncommunicated threats, in addition to showing the defendant's conception of that attitude and his resulting apprehension.

The nature and underlying principles of this class of evidence are closely analogous to those pertaining to evidence of the reputation of the deceased.[5] In both cases, because of the danger of abuse, a need has been felt for some manner of restriction on their use. Accordingly, it is now quite generally settled that such evidence is inadmissible where there is clear proof that the defendant himself was the aggressor.[6] Many jurisdictions go further than this and maintain that before such evidence can be introduced a foundation must be laid by other evidence of some overt act of aggression by the deceased.[7] This gives rise to the further question of the necessary *quantum* of evidence of the overt act, a point raised in the recent case of *State* v. *Boudreaux* (La. 1915) 68 So. 422. In this case, evidence of communicated threats was excluded by the trial judge on the ground that a proper foundation

[2]Bankston *v.* State (Tex. 1915) 175 S. W. 1068; Stokes *v.* People (1873) 53 N. Y. 164, 174; Campbell *v.* People (1854) 16 Ill. 17; People *v.* Palmer (1893) 96 Mich. 580; Holler *v.* State (1871) 37 Ind. 57. The theory upon which evidence of prior threats is admitted has sometimes been confused with the *res gestae* doctrine. See People *v.* Arnold, *supra.*

[3]Wallace *v.* U. S. (1895) 162 U. S. 466; People *v.* Rector (N. Y. 1838) 19 Wend. 569, 589; Dukes *v.* State (1858) 11 Ind. 557.

[4]An interesting point, illustrating the distinction between the two classes, is that in the case of communicated threats it is immaterial whether the deceased actually uttered them, if they were reported to the accused and believed by him to have been uttered. Rogers *v.* State (1912) 8 Okla. Cr. 226, 235; Buckner *v.* State (1909) 55 Tex. Cr. App. 511.

[5]See People *v.* Terrill (1914) 262 Ill. 138; *cf.* State *v.* Cushing (1897) 17 Wash. 544. Where the evidence offered concerns the reputation of the deceased, it must show brutality and recklessness of human life or an excessive strength sufficient to terrorize the defendant. It is not enough merely to show a turbulent and impetuous disposition. Spivey *v.* State (1881) 58 Miss. 858; People *v.* Rodawald (1904) 177 N. Y. 408.

[6]People *v.* Garbutt (1868) 17 Mich. 9, 15; Abbott *v.* People (1881) 86 N. Y. 460, 470; Ellis *v.* State (1898) 152 Ind. 326; see Wiggins *v.* People (1876) 93 U. S. 465; *cf.* People *v.* Taing (1879) 53 Cal. 602.

[7]Langham *v.* State (Ala. 1915) 68 So. 504; People *v.* Lombard (1861) 17 Cal. *317; Garner *v.* State (1891) 28 Fla. 113, 133; People *v.* Terrell, *supra*; State *v.* Harris (1912) 131 La. 616; State *v.* Scaduto (1907) 74 N. J. L. 289; see Malone *v.* State (1911) 176 Ind. 338, 342; State *v.* Cushing, *supra.* *Contra*, State *v.* Abbott (1875) 8 W. Va. 741, 759; Howard *v.* State (1887) 23 Tex. App. 265. There seems to be a tendency to distinguish in some cases between communicated and uncommunicated threats in applying the overt act test. *Cf.* Allison *v.* U. S. (1895) 160 U. S. 203, 213; Wiggins *v.* People, *supra.* In many States no mention is made of any test whatever. For an example of the use of threats by the deceased to explain other evidence, when the overt act test is not applicable, see State *v.* Pruett (1897) 49 La. Ann. 283, 291.

had not been laid. On appeal, the court held that admission or exclusion of such evidence lay within the sound discretion of the trial judge and that his decision would not be reviewed because only a part of the evidence on which it was based appeared in the transcript. Earlier decisions of the Louisiana courts have even gone so far as to hold that there must be complete proof of the overt act to the satisfaction of the trial judge.[8]

Since, in a doubtful case, threats will furnish some evidence of justification for self-defence, and since the accused is justly entitled to present to the jury every piece of evidence which may assist it in judging of this fact upon which his guilt may depend, it is difficult to find any good reason for the exclusion of this evidence except where it has already been clearly shown that the defendant was the attacking party. The injustice of any overt act test is particularly obvious in a case where no direct evidence of the encounter is obtainable, while the extreme adaptation of the rule, requiring the accused actually to prove self-defence before presenting evidence of threats to aid in proving it, forces him to wait until such evidence is useless. Where, however, the overt act test is *res adjudicata,* the best rule that can be adopted is to admit the threats on any evidence of an overt act, however slight, and this has been done in some jurisdictions.[9] This insures a rule of uniformity, which can never obtain where the question is left wholly to the discretion of the trial judge, and, at the same time, eliminates the difficulties of a review on appeal presented by the principal case.

COLOR OF TITLE.—The importance of color of title[1] in the law of adverse possession is, that, while ordinarily the occupant must show actual possession of all the land claimed, he may acquire title to the whole tract by occupying only a part,[2] provided he has color of title to the whole.[3] Color of title has been, perhaps, best defined as "that which in appearance is title, but in reality is not."[4] A deed void on

[8]State *v.* Ford (1885) 37 La. Ann. 443, 460; State *v.* Harris (1893) 45 La. Ann. 842; State *v.* Wiggins (1898) 50 La. Ann. 330, 338; but *cf.* State *v.* Golden (1905) 113 La. 791. For a critical comparison of the inconsistent holdings of the Louisiana courts, see 1 Wigmore, Evidence, § 246 n. 13, p. 312. One court has held that, though the admissibility of threats lies in the discretion of the trial judge, he must admit them wherever there is any doubt as to who was the aggressor. Wilson *v.* State (1892) 30 Fla. 234.

[9]Allison *v.* U. S., *supra*; Garner *v.* State, *supra*; see People *v.* Scoggins (1869) 37 Cal. 676; Jackson *v.* State (1873) 65 Tenn. 452. As to whether the defendant's sworn statement of his defence is alone sufficient evidence of the overt act to pave the way for threats and reputation, see Hart *v.* State (1896) 38 Fla. 39.

[1]The doctrine of color of title is peculiar to the United States. See Tate *v.* Southard (1824) 10 N. C. 119.

[2]The kind of occupancy or possession which is requisite to constitute adverse possession naturally varies with the nature, situation, and uses of the property. See Richmond Iron Works *v.* Wadhams (1886) 142 Mass. 569.

[3]See 4 Columbia Law Rev., 605.

[4]Wright *v.* Mattison (1855) 59 U. S. 50.